

benefits for a nine percent permanent partial general disability as defined by K.S.A. 44-510e.

Respondent and its insurance carrier contend Judge Avery erred in determining the amount of functional impairment claimant sustained due to his lumbar strain. They argue both Dr. Paul S. Stein and Dr. Steven L. Hendler concluded claimant had a five percent whole body functional impairment using the DRE (Diagnosis-Related Estimates) method of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.). They also contend claimant's expert witness, Dr. Peter V. Bieri, did not comply with the AMA *Guides* in determining claimant sustained a 13 percent whole body functional impairment as the doctor used the *Guides*' Range of Motion Model rather than the DRE method. Accordingly, respondent and its insurance carrier request the Board to find claimant has sustained a five percent whole body functional impairment. In the alternative, they request the Board to find claimant has sustained a 7.67 percent whole body functional impairment, which is an average of the three doctors' ratings.

Conversely, claimant contends Dr. Bieri adequately explained why the DRE method was not appropriate in this instance. Claimant argues Dr. Bieri's opinion regarding claimant's functional impairment is the most persuasive and, therefore, the Board should grant claimant disability benefits for a 13 percent whole body functional impairment.

The only issue before the Board on this appeal is the amount of permanent functional impairment claimant sustained due to his November 27, 2002 accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

1. Claimant is an equipment operator for respondent, the City of Cottonwood Falls. On November 27, 2002, while putting up a stand for a flag pole, claimant stepped into a drain and twisted his low back. The parties stipulated claimant's accident arose out of and in the course of his employment with respondent.
2. Claimant initially received treatment from a chiropractor but was eventually referred to Dr. Paul S. Stein, a board-certified neurosurgeon. Among other treatment, Dr. Stein requested an MRI and prescribed epidural steroid injections and eight weeks of physical therapy.
3. While recovering from his back injury, claimant was off work and received 18 weeks of temporary total disability benefits for the period from December 2, 2002, through April 7, 2003. No additional periods of temporary total disability benefits are

requested but initially there was a question whether claimant was paid at the appropriate rate.

4. After undergoing a functional capacity evaluation and receiving from Dr. Stein permanent medical restrictions based upon that functional capacity evaluation, claimant returned to work for respondent. At the time of the May 2004 regular hearing, claimant was performing his regular job duties, excluding shoveling and like work.¹
5. During the functional capacity evaluation, claimant experienced shortness of breath. According to claimant, he has probably experienced shortness of breath most of his life.² Claimant testified he is 5 feet 5 inches or 5 feet 6 inches tall and weighs approximately 300 pounds. Moreover, claimant agreed that before the accident he probably had some limitation regarding his ability to bend, twist and turn.³
6. Before the November 2002 accident, in addition to working for respondent, claimant also worked for the City of Elmdale as its water superintendent, which required him to check the chlorine level at Elmdale's water plant and check the sewer system on a daily basis. Before the accident, claimant also was the fire chief for the City of Strong City and an ambulance driver for Chase County. At the time of the regular hearing, claimant had resumed those positions but had altered his activities due to his back injury and work restrictions.
7. Respondent and its insurance carrier presented Dr. Stein's testimony. Dr. Stein began treating claimant on December 20, 2002, and diagnosed a back strain superimposed upon degenerative disc disease. The doctor last saw claimant on April 2, 2003, concluding claimant had reached maximum medical improvement. Using the *AMA Guides* (4th ed.), Dr. Stein rated claimant as falling within the DRE Lumbosacral Category II for a five percent whole body functional impairment. According to Dr. Stein, the DRE method was appropriate for rating claimant's impairment.⁴ In that regard, the doctor testified, in part:

Well, the [*Guides*] case book is fine and it just documents what I'm saying, but this is a very clear[-]cut situation. This patient has a

¹ R.H. Trans. at 15.

² *Id.* at 46.

³ *Id.* at 27.

⁴ Stein Depo. at 12.

back strain, he does not have a radiculopathy, which would go to Category III. He would not under any circumstances be anything above that category. The Guides say that in cases of injury, they want the DRE model used. It's straightforward.⁵

8. Dr. Stein also testified claimant's x-rays and MRI indicated his degenerative disc disease encompassed four of his five lumbar discs⁶ but the doctor believed only one disc level was causing claimant's ongoing pain.⁷
9. At his attorney's request, claimant saw Dr. Peter V. Bieri in early February 2004 to be evaluated for purposes of this claim. The doctor, who is a contributing author to the AMA *Guides*' (4th ed.) Casebook and the AMA *Guides* (5th ed.), determined claimant sustained a 13 percent whole body functional impairment due to his November 2002 back injury. According to Dr. Bieri, the DRE method of the *Guides* was not appropriate in this instance to rate claimant as the examination indicated claimant had verifiable and objective range of motion deficits.⁸ Therefore, the doctor used the *Guides*' Range of Motion Model, which combines the impairment from diagnosis-based disorders with the impairment due to lost range of motion. The doctor explained the Range of Motion Model was more appropriate than using the Diagnosis-Related Estimates Model, in part:

The DRE model is recommended when appropriate. On page 100 [of the *Guides*], under the general directions, it states under this model DRE's are differentiated according to clinical findings that are verifiable using standard medical procedures. On page 101 the range of motion is a differentiator. In essence that's a verified standard medical procedure. When the range of motion model is used as a differentiator the impairment percent cannot be assigned under the injury model lower than the lowest category of the injury model in question or higher. What that means is if the patient has verified range of motion loss you cannot reduce his rating to a category that does not reflect that. You have to utilize the range of motion.

. . . .

⁵ *Id.* at 24.

⁶ *Id.* at 17.

⁷ *Id.* at 22.

⁸ Bieri Depo. at 27.

Table 72 [the Diagnosis-Related Estimates chart] is not appropriate here because the claimant had range of motion deficits that were verifiable and objective. If you apply that to the DRE method the category that Dr. Hendler arrived at describes non-verifiable range of motion loss. The claimant clearly had measurable range of motion loss.⁹

10. Dr. Steven L. Hendler, who is a physical medicine and rehabilitation specialist, examined claimant in early April 2004 at the respondent and its insurance carrier's request. The doctor diagnosed lumbar strain with degenerative disc disease with morbid obesity and ruled out obstructive lung disease.¹⁰ Using the DRE method of the *Guides*, Dr. Hendler concluded claimant had a five percent whole body functional impairment due to his back injury. Dr. Hendler specifically disagreed with Dr. Bieri's use of the *Guides*' Range of Motion method in rating claimant's functional impairment.¹¹ The doctor agreed claimant had multiple levels of abnormal discs. Moreover, the doctor also found claimant had decreased motion in his lumbar spine, which the doctor considered in rating claimant's whole body functional impairment at five percent.
11. The Board is not persuaded that rating claimant under the Diagnosis-Related Estimates Model was any more appropriate than rating him under the Range of Motion Model. Accordingly, the Board finds no compelling reason to disturb the Judge's finding that claimant sustained a nine percent whole body functional impairment due to his November 27, 2002 accident. Claimant's permanent partial general disability is limited to his whole body functional impairment rating. Consequently, claimant is entitled to receive permanent disability benefits for a nine percent whole body functional impairment under K.S.A. 44-510e.

AWARD

WHEREFORE, the Board affirms the August 24, 2004 Award so far as it grants claimant a nine percent permanent partial general disability. But the award is computed as follows:

Rodney J. Cotton is granted compensation from the City of Cottonwood Falls and its insurance carrier for a November 27, 2002 accident and resulting disability. Based upon

⁹ *Id.* at 26-27.

¹⁰ Hendler Depo. at 9.

¹¹ *Id.* at 12.

an average weekly wage of \$374.77, Mr. Cotton is entitled to receive 18 weeks of temporary total disability benefits at \$249.86 per week, or \$4,497.48, plus 37.08 weeks of permanent partial general disability benefits at \$249.86 per week, or \$9,264.81, for a nine percent permanent partial general disability, making a total award of \$13,762.29, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael G. Patton, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director